NOV 2[illegible]
E. ROBERT [illegible], CLERK

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
NOV 26 1971
E. ROBERT SEAVER, CLERK

No. 71-543

LARY VON ZAMFT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

UPON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

WARREN E. MAGEE
Suite 308, Ridell Building
1730 K Street, N. W.
Washington, D. C. 20006
Counsel for Petitioner

Of Counsel:
MAGEE & BULOW
1730 K Street, N. W.
Washington, D. C. 20006

Washington, D. C. THIEL PRESS 202 393-0625

TABLE OF CONTENTS

REPLY TO RESPONDENT'S STATEMENT OF THE FACTS 2

REPLY TO RESPONDENT'S ARGUMENT 3

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

Bruton v. United States, 391 U.S. 124, 88 S.Ct. 1620 (1968) 2

Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840 (1966) 4

Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716 (1949) 2

IN THE

Supreme Court of the United States

No. 71-543

LARY VON ZAMFT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

UPON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The manner in which Respondent has treated the questions presented warrants the filing of this Reply Brief by Petitioner in order that the important questions involved may be properly presented to this Court.

REPLY TO RESPONDENT'S STATEMENT OF THE FACTS

Petitioner argued, because he was only charged as an accomplice in the Indictment and because no conspiracy was charged, that the confession of guilt of Copher and her hearsay statements with prosecution witnesses Meni, Brotman and Rogge were inadmissible against Petitioner (pp. 15-17) citing *Bruton v. United States,* 391 U.S. 124, 88 S.Ct. 1620 (1968) and *Krulewitch v. United States,* 336 U. S. 440, 69 S.Ct. 716 (1949). Petitioner further pointed out that the Government and the courts below permitted the confession or plea of guilty of Copher and the hearsay testimony of prosecution witnesses Meni, Brotman and Rogge on the authority of *"Delli Paoli v. United States,* 352 U. S. 232" notwithstanding that this Court reversed *Paoli* in *Bruton.* The Solicitor General studiously avoids discussing *Paoli* and *Bruton.* The authorities cited by Respondent (Mem. p.3) do not overrule *Krulewitch* or *Bruton.* Respondent contends that the receipt of this hearsay evidence and the admission of guilt of Copher are harmless errors on the premise that the evidence of guilt "was not close" (Mem. p. 3, note 2) and Copher's plea of guilty "came very early in the trial" (Mem. p. 4). Respondent's argument that the evidence "was not close" is without merit and when the hearsay evidence is eliminated and the plea of guilty eliminated, there was no circumstantial evidence to convict Petitioner as an accomplice.

The evidence relied upon by Respondent is primarily hearsay. The hearsay evidence is Meni (count 1) "testified that after he lost his occupational deferment he spoke with Mrs. Copher and she suggested that Petitioner might help him." (Mem. p. 1-2). "Brotman (count 2) testified he met with Mrs. Copher to discuss his classification. She said she knew someone who might help him and referred him to Petitioner." (Mem. p. 2). "Rogge (count 4, upon which Petitioner was acquitted) testified he also spoke with Mrs. Copher at the Draft Board about his deferment; that she

told him giving a deferment could depend upon whom one knew; and that she put him in contact with an individual who looked very much like Petitioner * * * ." (Mem. p. 2).

Respondent concedes that this testimony and the plea of guilty under Count 1 of the Indictment was essential to prove the Government's case because "the Government had to prove the commission of the basic offense which Petitioner was charged with aiding and abetting." (Mem. p. 3).

Respondent further concedes that the trial judge erred in not instructing the jury that Mrs. Copher's admission of guilt could not be considered against Petitioner but seeks to avoid this essential element of proof by calling it "harmless error." (Mem. pp. 3-4).

REPLY TO RESPONDENT'S ARGUMENT

1, 2. As we pointed out in our Petition, the use of hearsay testimony to establish Petitioner was an aider or abettor and the use of a plea or confession of guilt to establish the guilt of Petitioner violates *Bruton* and the numerous decisions following *Bruton*, and this departure from the accepted course of judicial proceedings in criminal cases in the Fifth Circuit should be corrected under this Court's power of supervision in the public interest. (Petition, p. 23).

3. Respondent contends that the prosecutor was right in refusing, and the Court did not commit error in refusing, to require the production of the Grand Jury testimony of the witness Rogge after it was shown on cross-examination that he had testified to the facts to the Grand Jury which returned the Indictment. In support of this erroneous position, Respondent states "At the time of Petitioner's trial, absent a showing of a particularized need, the production of the Grand July minutes was not required. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395. Petitioner made no showing of particularized need." (Mem. p. 4). Footnote 4 shows that the date of trial was in June of 1970.

We are surprised at this argument because prior to Petitioner's trial, this court decided *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840 (1966). *Dennis* reviewed Pittsburgh Plate Glass and clearly modified that decision in the area of particularized need. Under *Dennis* at the time Petitioner was tried in June, 1970, once it was shown that a witness had testified to facts involved before a Grand July, the defendant was entitled to examine the Grand Jury minutes and a refusal to permit such an examination by Petitioner, requires a reversal of a judgment of conviction. *Dennis* holds (pp. 869-871, 1849, 874-875, 1851-1852):

> "In general, however, the Court has confirmed the trial court's power under Rule 6(e) of the Federal Rules of Criminal Procedure to direct disclosure of grand jury testimony 'preliminarily to or in connection with a judicial proceeding.' In United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234, 60 S.Ct. 811, 849, 84 L.Ed. 1129, the Court acknowledged that 'after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.' In *Proctor & Gamble, supra,* the Court stated that 'problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility * * *' are 'cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly.' 365 U.S., at 683, 78 S.Ct., at 987. And in *Pittsburgh Plate Glass, supra,* where four members of the Court concluded that even on the special facts of that case the witness' grand jury testimony should have been supplied to the defense, the entire Court was agreed that upon a showing of 'particularized need' defense counsel might have access to relevant portions of the grand jury testimony of a trial witness, 380 U.S., at 400, 405, 79 S.Ct., at 1241, 1244. In a variety of circumstances, the lower federal courts, too, have made grand jury testimony available to defendants.
>
> These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes

the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act, 18 U.S.C., Sec. 3500 (1964 ed.), responding to this Court's decision in Jencks v. United States, 353, U.S. 657, 77 S.Ct. 1007, 1 L.Ed. 2d 1103, which makes available to the defense a trial witness' pretrial statements insofar as they relate to his trial testimony. It is also reflected in the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice.

* * * * *

In *Pittsburgh Plate Glass, supra,* the Court reserved decision on the question whether *in camera* inspection by the trial judge is an appropriate or satisfactory measure when there is a showing of a 'particularized need' for disclosure. 360 U.S., at 400, 79 S.Ct., at 1241. This procedure, followed by production to defense counsel in the event the trial judge finds inconsistencies, has been adopted in some of the Courts of Appeals. In the Second Circuit it is available as a matter of right. While this practice may be useful in enabling the trial court to rule on a defense motion for production to it of grand jury testimony—and we do not disapprove it for that purpose—it by no means disposes of the matter. Trial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. In any event, 'it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness.' *Pittsburgh Plate Glass,* 360 U.S., at 410, 79 S.Ct., at 1246 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges

> to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process: for example, to cause the elimination of extraneous matter and to rule upon applications by the Government for protective orders in unusual situations, such as those involving the Nation's security or clearcut dangers to individuals who are identified by the testimony produced. Cf. Fed. Rule Crim. Proc. 16(e), as amended in 1966; 18 U.S.C., Sec. 3500(c).
>
> Because petitioners were entitled to examine the grand jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross-examination, we reverse the judgment below and remand for a new trial."

Under *Dennis*, Petitioner is entitled to a new trial.

CONCLUSION

Petitioner submits and again prays that his Petition for Writ of Certiorari be granted and the decision below reversed.

Respectfully submitted,

Warren E. Magee
Suite 308, Riddell Building
1730 K Street, N. W.
Washington, D. C. 20006
Counsel for Petitioner

Of Counsel:

Magee & Bulow
1730 K Street, N. W.
Washington, D. C. 20006

Dated November 24, 1971.